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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 783.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE et al.,
Petitioner,

v.

T. V. WILLIAMS, REVENUE COMMISSIONER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS.

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Questions Presented	2
IV. Statement	4
V. Argument	28
1. This Court Lacks Jurisdiction for the Reason That the Only Aspect of This Case Which Is Not Moot, i. e., the $25,000 Fine, Is Not Yet Final	28
2. Adequate State Grounds Support the Decision Below Dismissing the Writ of Error	31
(a) The decision below is correct and in accordance with petitioner's own contentions in a prior stage of this case	32
(b) There are other adequate state grounds not attacked by petitioner	44
1. Estoppel	44
2. Petitioner failed to comply with the mandate of the Court of Appeals in making corrections to the record in the manner required by law	46
(c) Even assuming the bill of exceptions was unconditionally certified, it was subject to dismissal because not filed within the time prescribed by law	48
3. The Judgment of Contempt Is Not Erroneous for Any Reason Assigned	48
VI. Conclusion	51

Cases Cited.

Adamson v. Bradley, 147 Ga. 328, 93 S. E. 894 (1917) 38
Amalgamated Association v. Wisconsin Employment Relations Board, 340 U. S. 416, 95 L. Ed. 389 (1951) 28
Anderson v. Walker & English, 73 Ga. 114 (1884) 37

Board of Education of Glynn County v. Day, 128 Ga. 156, 166, 57 S. E. 359 (1907) 45
Bowles v. Willingham, 321 U. S. 503, 520, 88 L. Ed. 892 (1944) 50
Brady v. Joiner, 101 Ga. 190, 193, 28 S. E. 679 (1897).. 45
Buchman v. Smith et al., 136 N. J. Eq. 246, 41 A. 2d 262, 264 (1945) 49

Campbell v. Foute, 6 Ga. App. 113, 645 S. E. 292 (1909) 22
Central of Ga. Ry. Co. v. Mills, 143 Ga. 47, 84 S. E. 120 (1915) 38
Clyde v. State, 97 Ga. App. 493, 103 S. E. 2d 448 (1958) 40
Collins Park Co. v. Ware, 110 Ga. 307, 35 S. E. 121 (1900) 47
Consolidated Rendering Company v. Vermont, 207 U. S. 541, 551, 52 L. Ed. 327 (1908).....49, 51
Covin v. Willie, 19 Ga. App. 259, 91 S. E. 278 (1917) 22

De Saussure v. Gaillard, 127 U. S. 216, 234, 32 L. Ed. 125, 132 (1888) 31
Doremus v. Bd. of Education of Hawthorne, 342 U. S. 429, 96 L. Ed. 475 (1952)..... 28
Durley v. Mayo, 351 U. S. 277, 281, 100 L. Ed. 1178 (1956) 46

Eady et al. v. Magnolia Cemetery Co. et al., 175 Ga. 787, 166 S. E. 436 (1932)..... 38
Eagles v. United States, 329 U. S. 304, 91 L. Ed. 308 (1946) 28
Edelman v. California, 344 U. S. 357, 97 L. Ed. 387 (1953) 31
Empire Life Ins. Co. v. Perkins, 19 Ga. App. 77, 90 S. E. 981 (1916)..... 45

Endicott Johnson Co. v. Perkins, 317 U. S. 501, 87 L. Ed. 424 (1943) 50
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 61 L. Ed. 644 (1917) 31, 46

Fort v. Sheffield, 108 Ga. 781, 33 S. E. 660 (1899)..... 38

Ga.-Ala. Power Co. v. Fields et al., 42 Ga. App. 141, 152, 155 S. E. 342 (1930)..... 45
Georgia R., etc. Co. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065 (1923) 30
Gibson v. Mississippi, 162 U. S. 565, 591, 40 L. Ed. 1075, 1082 (1896) 32
Goodyear Tire and Rubber Co. et al. v. N. L. R. B., 122 Fed. 450 (C. C. 6th 1941) 49
Gospel Army v. Los Angeles, 331 U. S. 543, 91 L. Ed. 1662 (1947) 30

Hartford Life Ins. Co. v. Johnson, 249 U. S. 490, 492, 63 L. Ed. 722, 724 (1919) 31, 32
Hawkins et al. v. Mayor & C. of Americus, 102 Ga. 786, 30 S. E. 519 (1898)..... 38, 39
Hedgebeth v. North Carolina, 334 U. S. 806, 92 L. Ed. 1739 (1948) 31

In re Application of Daniels, 140 F. Supp. 322 (D. C. N. Y. 1956), aff'd 224 F. 2d 882 51
Isbrandtsen-Moler Co. v. U. S., 300 U. S. 139, 149, 81 L. Ed. 562, 570 (1937) 49

Jarriel v. Jarriel, 115 Ga. 23, 41 S. E. 262 (1902)..... 38
Jones v. Andrews, 89 Ga. App. 734 (2), 81 S. E. 2d 304 (1954) 31
Jones v. West View Cemetery, 103 Ga. 560 (1), 29 S. E. 710 (1897)..... 47

Lankford v. Milhollin et al., 201 Ga. 594 (4), 40 S. E. 2d 376 (1946)..... 45
Leathe v. Thomas, 207 U. S. 93, 52 L. Ed. 118 (1907).. 31
Love v. Love, 146 Ga. 160, 91 S. E. 27 (1916)..... 38

Ludden & Bates Sou. Music Co. v. Toney, 42 Ga. App. 434, 156 S. E. 706 (1931) 45
Martinez v. International Banking Corp., 220 U. S. 214, 55 L. Ed. 438 (1911) 30
Masland v. Kemp et al., 80 Ga. 365, 10 S. E. 124 (1888) 37
Mississippi C. R. Co. v. Smith, 295 U. S. 718, 79 L. Ed. 1673 (1935) 50
Montgomery Bldg. & Contr. Trades Council v. Ledbetter Erection Co., 344 U. S. 178, 97 L. Ed. 204 (1952) 29
Moore Ice Cream Co. v. Rose, 289 U. S. 373, 384, 77 L. Ed. 1265 (1933) 50
Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117 (1885) 30
Murray v. Davidson, 174 Ga. 213, 218, 162 S. E. 526 (1932) 47
NAACP v. Alabama, 357 U. S. 449, 466-467, 2 L. Ed. 2d 1488 (1958) 30, 32, 42, 50
NAACP et al. v. Pye, Judge, 96 Ga. App. 685, 101 S. E. 2d 609 (1957), reh. den. November 18, 1957 ...2, 9, 24, 33
NAACP et al. v. Williams, 98 Ga. App. 74, 104 S. E. 2d 923 (1958), reh. den. July 31, 1958 .....1, 26
Nash v. United States, 229 U. S. 373, 377, 57 L. Ed. 1232 (1913) 50
Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300, 82 L. Ed. 276 (1937) 51
Newman v. Gates, 204 U. S. 89, 51 L. Ed. 385 (1907).. 31
Northwestern Mut. Life Ins. Co. v. Suttles, 201 Ga. 84, 97, 38 S. E. 786 (1946)..... 45
Oklahoma Press Co. v. Walling, 327 U. S. 186, 216, 90 L. Ed. 614 (1946) 50
Owensby v. Thompson, 69 Ga. 773 (1882) 35
Palmer v. Jackson, 188 Ga. 336, 338 (7), 4 S. E. 2d 28 (1939) 45
Parker v. Illinois, 333 U. S. 571, 92 L. Ed. 886 (1948) 30
Patterson v. Beck, 133 Ga. 701, 704, 66 S. E. 911 (1910) 47
Pope v. Atlantic Coast Line R. Co., 345 U. S. 379, 97 L. Ed. 1094 (1945)..... 29

Priester v. Brady, 138 Ga. 69, 74 S. E. 757 (1912).... 38

Radio Station WOW v. Johnson, 326 U. S. 120, 89 L. Ed. 2092 (1945)..... 29

Rawleigh Co. v. Forbes, 202 Ga. 425, 43 S. E. 2d 642 (1947) 40, 41

Republic Natural Gas Co. v. Oklahoma, 334 U. S. 62, 92 L. Ed. 1212 (1948).....29, 30

St. Pierre v. United States, 319 U. S. 41, 42, 87 L. Ed. 1199 (1943) 28

Sanges v. State, 110 Ga. 260, 34 S. E. 327 (1899) 37

Southern P. Co. v. Gileo, 351 U. S. 493, 100 L. Ed. 1357 (1956) 30

Swafford v. Keaton et al., 147 Ga. 491, 94 S. E. 568 (1917) 38

United States v. Morton Salt Co., 338 U. S. 632, 94 L. Ed. 401 (1950) 50

Walden v. Nichols, 204 Ga. 532, 534 (2), 50 S. E. 2d 105 (1948) 45

Watkins v. State, 29 Ga. App. 320, 114 S. E. 915 (1922) 38

Webb v. Hicks, 117 Ga. 335, 340, 43 S. E. 738 (1903).. 49

Weinberg v. Barnes et al., 30 Ga. App. 675, 118 S. E. 758 (1923) 35

Wheeler v. United States, 226 U. S. 478, 57 L. Ed. 309 (1913) 49

Williams, Rev. Comm'r, v. Stockham Valves, Inc., ... U. S. ..., 3 L. Ed. 2nd 421 (decided Feb. 24, 1959) 51

Williams v. Smith, Judge, 93 Ga. App. 429 (2), 91 S. E. 2d 840 (1956)..... 40

Wilson v. Standefer, 184 U. S. 399, 415, 46 L. Ed. 612, 619 (1902) 50

Yakus v. U. S., 321 U. S. 414, 442, 88 L. Ed. 834 (1944) 50

Youmans, Sheriff, v. Consumers Finance Co., 80 Ga. App. 676, 57 S. E. 2d 238 (1950)..... 39

Statutes Cited.

28 U. S. C., Sec. 1257 ..... 2, 31
Georgia Code:
Sec. 6-1001 (Supp.) 3, 26, 48
Sec. 92-3205 5
Sec. 92-3213 6
Sec. 92-3214 6
Sec. 92-3105 6
Sec. 6-902 20
Sec. 6-909 (Supp.) 21
Sec. 6-910 24
Sec. 6-806 ..... 34, 35
Sec. 102-102 35
Secs. 92-3216, 92-9914 51
Sec. 92-3113 51
26 U. S. C. A., Secs. 7602, 7604 (b), 7402 49
2 U. S. C. A. Sec. 182 (Supp.) 50

Textbooks Cited.

Georgia Procedure and Practice, Sec. 23-15, p. 558 20
Georgia Procedure and Practice, Sec. 23-8 et seq. 20
Leverett, "The Need for Appellate Reform in Georgia," 18 Ga. B. J. 415 (1956) 20
Georgia Procedure and Practice, Sec. 23-12, p. 552 ... 22, 44
Georgia Procedure and Practice, Sec. 22-9 22
Georgia Procedure and Practice, Sec. 23-24 42
"The Proposed Rules Revising Appellate Procedure," 19 Ga. B. J. 145, 162 (1956) 23
Boskey, Finality of State Court Judgments Under the Federal Judicial Code, 43 Columbia L. Rev. 1002 (1943) 29
"The Revision of Rules of Practice and Procedure in Georgia," 8 Ga. Bar J. 279, 280 (1946) 36
Georgia Procedure and Practice, Sec. 23-16, p. 562 48

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T. V. WILLIAMS, REVENUE COMMISSIONER,
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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Court of Appeals of Georgia dismissing the writ of error, which decision is sought to be reviewed here, is reported as **NAACP et al. v. Williams,** 98 Ga. App. 74, 104 S. E. 2d 923 (1958), reh. den. July 31,

1958. Certiorari was denied by the Supreme Court of Georgia on October 15, 1958, without opinion. A prior decision of the Georgia Court of Appeals refusing mandamus to require the trial judge to certify the bill of exceptions is reported as **NAACP et al. v. Pye, Judge,** 96 Ga. App. 685, 101 S. E. 2d 609 (1957), reh. den. November 18, 1957. Another aspect of this case which is not drawn in question here is reported in 98 Ga. App. 753, 107 S. E. 2d 243 (1958).

II.

JURISDICTION.

Jurisdiction is invoked by petitioner under 28 U. S. C., § 1257. Respondent denies the jurisdiction of this court, as will more fully be shown hereinafter, on grounds that (1) the decision below was rendered on valid, non-federal grounds, and (2) no final judgment has yet been rendered on the only aspect of this case which is not moot.

III.

QUESTIONS PRESENTED.

1. Whether the only aspect of this case which is not moot, i. e., the $25,000.00 fine imposed upon the petitioner, is jurisdictionally final in view of the fact that the trial court has not yet entered a final judgment apportioning and/or reducing this fine in accordance with its original order adjudging petitioner in contempt, which provided: "It is further ordered that said Corporation forthwith pay into the office of the Clerk of this Court a fine of twenty-five thousand dollars, to be hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books, records and data hereby

ordered, to reduce the amount of said fine if such should be just under the circumstances then existing," more particularly in view of the fact that a motion by petitioner for such an order is now pending before the trial court and has not been ruled upon.

2. Whether in any event this Court has jurisdiction in view of the adequate state grounds supporting the decision of the Georgia Court of Appeals. Insofar as petitioner has sought to maintain that one of these state grounds is "colorable":

(a) Whether any rights of petitioner were denied by the decision of the Georgia Court of Appeals dismissing the writ of error on the ground that it was not unconditionally certified as required by Georgia law, where it is seen that petitioner itself consistently maintained and insisted in prior proceedings in this case that such certification was not unconditional, and the Court of Appeals had so held in the mandamus proceedings.

(b) Whether, in any event, the other state ground relied upon by the Georgia Court of Appeals and not attacked by petitioner is adequate to support the decision below.

(c) Whether, even assuming otherwise, i. e., that such certification was unconditional, the writ of error was not subject to dismissal, anyway, on ground that it had not been filed within 15 days of certification as required by Ga. Code, § 6-1001 (Supp.).

3. Whether, in any event, the grounds of petitioner's attack on the judgment adjudging it in contempt are meritorious.

IV.

STATEMENT.[1]

Petitioner, a New York Corporation, doing business in Georgia through chartered local branches, was adjudged in contempt of Fulton Superior Court for refusal to produce its books and records for inspection by the Revenue Commissioner of Georgia. The trial court below imposed a $25,000.00 fine, reserving the right therein to apportion the fine "remedially and punitively," and to "reduce the amount of said fine if such should be just under the circumstances then existing."[2]

In preparing the transcript of record for transmittal to the Georgia Court of Appeals, petitioner refused to make corrections as directed by the trial judge and instituted mandamus proceedings in the Court of Appeals to require the trial judge to unconditionally certify the bill of exceptions, the petition asserting that the judge's certificate was qualified, conditional and void, because of recitations therein pointing out deficiencies in the brief of evidence which required correction. The Court of Appeals, while holding that the bill of exceptions had not been unconditionally certified, nevertheless determined that the trial judge had not erred in refusing to certify unconditionally until the corrections therein referred to had been made. Accordingly, mandamus was denied (96 Ga. App. 685, 101 S. E. 2d 609).

Upon remand to the trial court, petitioner not only failed to make the corrections in the brief of evidence in the man-

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[1] Record citations herein are to the record as filed in the Georgia Court of Appeals, a copy of which respondent understands was sent to this court.

[2] (R. 86) No final judgment has ever been rendered on this order. Of all of the defendants below, the corporation is the only party-petitioner in this Court.

ner required by law, but also filed the original bill of exceptions containing the judge's certificate previously claimed by petitioner, and held by the Court of Appeals, to have been conditional and for that reason void.[3] In so doing, petitioner reversed completely its prior position, and now asserted that the certificate was unconditional, thereby dispensing with the necessity of procuring a new certification. When the case reached the Court of Appeals again, respondent's motion to dismiss was sustained.

However, because respondent does not accept as accurate and complete the statement made by petitioner, the facts will be stated in full from the beginning.

PROCEEDINGS BELOW.

On November 21, 1956, agents of the State Revenue Commissioner presented written demand at the Atlanta Branch office of the National Association for The Advancement Of Colored People, a New York corporation, located at 204 Auburn Avenue, Atlanta, Georgia, and at its Southeastern Regional Headquarters, located at 859½ Hunter Street, N. W., Atlanta, Georgia, calling upon said corporation, and various individual defendants alleged to be officers and agents thereof (none of whom are parties here), to produce their books and records for inspection for income tax purposes. The demand,[4] which covered the taxable years 1947 through 1955, pointed out that under Ga. Code § 92-3205,[5]

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[3] Under Georgia Law, in order to confer jurisdiction on the appellate court, a bill of exceptions must have been certified as "true and correct" by the trial judge.

[4] One demand was addressed to the Branch office (R. 5); another to the Regional Headquarters (R. 10).

[5] Section 92-3205 provides: "Every partnership, corporation, association or insurance company, being a resident or having a place of business in this State, including lessees or mortgagees or real or personal property, fiduciaries, employers, and all officers and employees of the State or of any political subdivision of the State,

all specified corporations and associations were required to file annual income tax returns, or where such corporation claimed exemption therefrom, the Regulations[6] issued by the Revenue Commissioner required that the corporation first procure a certificate of tax exemption status. The demand was made pursuant to Ga. Code § 92-3213, which provides:

> "The State Revenue Commission, for the purpose of ascertaining the correctness of any return under this or any prior law, or for the purpose of making a return where none has been made, is hereby authorized, by any agent or employee of its office, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return."

Upon refusal by all defendants (after consultation with their counsel) a petition was on that day presented to the Fulton Superior Court, praying that an order issue requiring defendants to produce said books and records instanter for inspection (R. 1-16). The petition was brought pursuant to Ga. Code § 92-3214, which provides:

> "If any individual, corporation, or partnership, or fiduciary, or any officer or employee or member of the partnership required under this law to pay any tax,

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having the control, receipt, custody, disposal or payment of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income amounting to $1,000 or over, paid or payable during any year to any taxpayers, shall make complete returns thereof under oath to the State Revenue Commission, under such regulations and in such form and manner and to such extent as may be prescribed by the Commission; and unless such income is so reported, the Commission may disallow such payments as deductions or credits in computing the tax of the payer."

[6] The Regulation referred to, issued pursuant to Ga. Code, § 92-3105, was introduced in evidence without objection (R. 995), and is included in the transcript of record in this Court (R. 705-707).

make any return, or supply any information, or exhibit any books or records when requested to do so by the State Revenue Commission or any agent designated by the Commission, whether with reference to their own returns or not, shall refuse to do so, the superior court for the county in which such person resides shall have jurisdiction by appropriate process to compel such testimony or production of books, papers or other data."

The Court's order, in its relevant part, provides:

> "It Is Hereby Ordered that the National Association for the Advancement of Colored People, a Corporation organized under the laws of New York, and its duly authorized officers, agents and employees, to-wit: John C. Calhoun, D. W. Hodges, L. W. Milton, Mrs. Eunice Cooper, D. L. Hollowell and Mrs. Ruby Hurley, produce the said books, records and other data in their individual possession or control instanter for the inspection by T. V. Williams, Revenue Commissioner of Georgia, or any of his duly authorized agents."

The order was duly served (R. 16), and upon refusal by defendants to comply, an attachment for contempt was issued on the same day (R. 18), following an informal hearing before Judge Pye, at which counsel for both parties were present (R. 729). The attachment requires the defendants to show cause,

> " . . . **why they have not complied with said order,** and let them then and there show further cause why they should not be attached for contempt in failing to comply with said order" (R. 21).

Motions to dismiss and responses, which were practically identical, were filed by all defendants (R. 27-75).

The contempt hearing commenced on December 6, 1956, the trial lasting for 5 days, during which all individual

defendants testified at length,[7] as well as agents of the Revenue Commissioner.[8]

The matter was taken under advisement by the Court, and on December 14, 1956, judgment was rendered acquitting defendants Hodges and Cooper (R. 82). Defendants Milton and Hurley, while not adjudged in contempt, were directed to produce specified records (R. 81, 83), which was done. None of these four defendants were parties to the appeal to the Georgia Court of Appeals. Defendant Calhoun was adjudged in contempt, and ordered confined in jail until he complied (civil contempt), and by way of criminal contempt, was given a sentence of 12 months in jail, suspended "so long as he behaves himself" (R. 84). Neither the four defendants previously referred to, nor defendant Calhoun, are parties to the petition for certiorari filed in this court.

Defendant Corporation was also adjudged in contempt "in the respects above stated as to respondent John H. (John C.) Calhoun . . . " It was provided that:

> " . . . said corporation forthwith pay into the registry of the Clerk of this Court a fine of twenty-five thousand Dollars, **to be hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books, records and data hereby ordered, to reduce the amount of said fine if such should be just under the circumstances then existing"** (R. 86). (Emphasis supplied.)

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[7] V. W. Hodges (R. 829-872); J. H. Calhoun, President, Atlanta Branch (R. 872-943; 1023-1037; 1047-1055); L. D. Milton, Treasurer (R. 943-968; 1055-1066); Eunice Cooper, Secretary, Atlanta Branch (R. 969-994); Ruby Hurley, Southeastern Regional Secretary (R. 995-1023; 1041-1047).

[8] William E. Strickland, Supervisor, Delinquent Income Tax Section (R. 734-789); Robert C. Huber, Tax Examiner (R. 789-829).

It is thus seen that so much of the judgment as relates to the amount of the fine imposed on the Corporation is not final, as the Court reserved the right (1) to further apportion the $25,000.00 **as between civil and criminal contempt** after compliance by the Corporation, and (2) to reduce the amount **as a whole**, after compliance.[9]

Following rendition of this judgment, defendants Corporation and Calhoun sought to file a bill of exceptions, but upon refusal of the trial court to certify the bill of exceptions in the manner and form as presented by defendants, the latter applied to the Georgia Court of Appeals for mandamus, which was denied. **National Association for the Advancement of Colored People, et al. v. Pye,** 96 Ga. App. 685, 101 S. E. 2d 609 (1957). Certiorari was denied by the Georgia Supreme Court, without opinion.

Upon remand to the trial court, defendants did not re-tender the bill of exceptions with a new, unqualified certificate, but merely filed in Court the bill of exceptions with the judge's original certificate as conditionally certified prior to the mandamus. Moreover, the stenographic brief of evidence as sent up was not corrected as required by the Court's certificate thereto, as it appears at pages 1072-73 of the record.[10] These irregularities were the

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[9] Another point sought to be made in the bill of exceptions in the Court of Appeals (p. 9), i. e., the claim that the judgment of the court was unreasonable in requiring defendant Corporation to produce in Georgia all its records, whether within or without the State (R. 85), is also moot. On January 18, 1957, defendants sought to file a motion to modify the judgment as to this feature, but the Court declined to issue a rule nisi thereon, as appellate proceedings had already been commenced. Subsequently, on May 22-23, 1957, agents of the Revenue Commissioner visited defendants' New York office and obtained this information there, without the necessity of removing defendants' books.

[10] After the remittitur of the Court of Appeals on the mandamus was filed below, defendants filed what purported to be an amendment to the brief of evidence on March 14, 1958, undertaking to amend it in accordance with the Judge's directions, in the same manner that pleadings are amended. The brief itself was not physically changed by actually inserting new pages and striking therefrom.

subject matter of a motion to dismiss separately filed in the Court of Appeals by defendant in error.[11]

The Brief of Evidence.

Petitioner carried to the Court of Appeals, pursuant to directions of the trial court below, the complete, unabridged transcript of the evidence, consisting of all motions, arguments, colloquies, excluded evidence, etc. (R. 88-720). No question as to this requirement of the court was made below or on the application for mandamus previously denied by the Court of Appeals. Petitioner also carried to the Court of Appeals a "Brief of Evidence" as required by law (R. 721-1073). For some unknown reason, the documentary evidence adduced at the trial was included in the unabridged transcript, rather than in the brief of evidence. See Record, pages 700-720.

The Evidence as to the Relationship Between the National Association for the Advancement of Colored People, a Corporation, and the Atlanta Branch Thereof and Its Officers.

The Charter of the National Association for the Advancement of Colored People (R. 709-716), which was introduced in evidence without objection (R. 995), discloses that it is a New York corporation, originally chartered in 1911, its declared purpose being "to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the

[11] Under Georgia law, there is no procedure whereby a defendant in error on appeal can obtain a ruling on motion to dismiss prior to argument on the merits, and it is the uniform practice to present both questions, i. e., the motion to dismiss and argument on the merits, by brief and oral argument.

law" (R. 709). The principal office is declared to be New York, but it is further provided that,

> " . . . the Directors may establish **branch or auxiliary offices elsewhere in the United States for the purpose of carrying on the work of the corporation** . . . " (R. 710).

A membership application blank (R. 701), admitted without objection (R. 871-2), states that,

> "NAACP covers the country, and the association's strength lies in its membership--a quarter of a million strong in forty-five states, the District of Columbia, and the Territory of Alaska. NAACP members, of all races and religions, **are organized into more than a thousand branches, which in turn form thirty state conferences and several regional conferences** . . . "

A letterhead (R. 702) was also admitted without objection (R. 994), which was headed as follows:

"Atlanta Branch
National Association for the Advancement
of Colored People
(N. A. A. C. P.)
204 Auburn Ave., N. E.
Atlanta, Georgia

J. H. Calhoun,
Acting President

National Headquarters
20 W. 40th St., New York"

As further indicative of the affiliation of the Atlanta Branch with the New York corporation is the "certified Statement for Annual Registration of a Corporation" (R. 703) on file in the Secretary of State's office, admitted without objection (R. 995), which declared, inter alia,

> "National Association for the Advancement of Colored People.
>
> Principal Office: 20 West 40th St., New York, N. Y.
>
> Principal Office in Georgia: 204 Auburn Avenue, N. E., Atlanta."

It will be noted that the declared Georgia address of the corporation as filed by its Executive Secretary is 204 Auburn Avenue, the identical address of the Atlanta Branch named in the Revenue Commissioner's demand (R. 5).

Defendant Ruby Hurley, admittedly an agent of the Corporation and its Southeastern Regional Secretary,[12] testified that the New York corporation "issues charters to each individual branch," and that before any "Branch" uses the name "National Association for the Advancement of Colored People," "it has been issued one of these charters . . ." from the New York office (R. 1044).

Defendant Calhoun, President of the Atlanta Branch, testified that he understood that the Atlanta Branch has "a charter or some other similar authority" from the National Association in New York (R. 874), and that the Atlanta Branch is:

> ". . . an association of persons in Atlanta who are members of the National Association in New York" (R. 879).

He also stated that, "I am a member of the Atlanta Branch by virtue of the fact that I belong to the National Association in New York" (R. 900).

Defendant Hodges, who answered the telephone for the office at 204 Auburn Avenue, testified that under the By-Laws and Constitution of the National Association (New York), the President of the Atlanta Branch could act for all its members (R. 854).

William E. Strickland, Supervisor of the Delinquent Income Tax Section, testified that when he presented the

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[12] See Response of the Corporation (R. 45); Testimony of Hurley (R. 996).

Commissioner's demand at the 204 Auburn Avenue address, a sign on the door read,

"NAACP, Atlanta Branch" (R. 743).

Defendant Hodges testified to the same effect (R. 832).

Hodges testified that the policies of the Atlanta Branch are in accord with those of the New York office (R. 847), and when defendant Calhoun was read the policies of the National Association as stated in its charter (R. 50, 709), he testified that these policies were also those of the Atlanta Branch (R. 922).

The evidence was uncontradicted that the National Association prepares literature and propaganda which is distributed to the branches (including the Atlanta Branch) which in turn distributes it to individuals;[13] that the New York office furnishes membership envelopes to the branches;[14] that speakers for the branches are sent down from New York at the expense of the local branch;[15] that Ruby Hurley, the Southeastern Regional Secretary of the National Association, is the "liaison" between the New York office and the branches,[16] and that the branches write her giving reports (R. 1006) and she suggests programs to the branches (R. 847, 1006, 1020); that she exchanged correspondence with defendant Calhoun, President of the Atlanta Branch;[17] and that a person desiring to participate in meetings held by the Atlanta Branch is required to present his membership card issued by the New York office.[18]

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[13] Hurley (R. 1000, 1042); Calhoun (R. 898, 907, 1050); Hodges (R. 867-8).

[14] Hurley (R. 1000-01, 1018, 1022).

[15] Hodges (R. 848); Hurley (R. 1043).

[16] Hurley (R. 1000).

[17] Calhoun (R. 936). Correspondence is also exchanged between the New York office and the branches (R. 847).

[18] Calhoun (R. 881, 879).

Voluminous testimony was elicited from the defendants conclusively establishing that the Atlanta Branch acted as the agent, and, as its very name implies, the "branch" of the New York corporation in soliciting members, collecting and forwarding fees, and disseminating the National Association's literature. It was established that membership in a branch was tantamount to membership in the corporation;[19] that the branch holds meetings and distributes literature[20] at which membership drives are conducted;[21] that membership fees or "dues" are $2.00 annually for adults, $3.50 annually which includes a subscription to the "Crisis" magazine published by the New York office, $500.00 for a lifetime membership, and graduated membership fees for students and minors;[22] that upon making a solicitation and accepting membership fees, whether at meetings or otherwise, the solicitor places the money in an envelope furnished by the New York office, fills in and tears off a receipt attached thereto which is given to the person solicited;[23] the money, in the envelopes is given to a "membership committee,"[24] or else delivered directly to the Auburn Avenue office,[25] where the money is removed from the envelopes and the latter, with the contributor's name written thereon is retained;[26] the money is then aggregated by the clerical workers and sent with the deposit slips for depositing in the Citizens Trust Company by defendant L. D. Milton, President of the Bank and

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[19] Calhoun (R. 879, 881, 900).

[20] Calhoun (R. 898).

[21] Calhoun (R. 892).

[22] Hodges (R. 852-3).

[23] Calhoun (R. 911).

[24] Hodges (R. 852).

[25] Calhoun (R. 881).

[26] Id. (R. 897).

Treasurer of the Branch,[27] who sends monthly statements to the Branch's public accountants.[28] At periodic intervals, defendants Calhoun, the President, and Cooper, the Secretary, issue vouchers directing Treasurer Milton to issue checks for the payment of bills and to forward the membership fees to the New York office.[29] From each $2.00 membership fee collected, the Branch would receive 90 cents and the New York office would receive $1.10.[30] The Branch, its officials and members would accept membership applications, contributions, and membership fees on behalf of the New York office, and through the Branch office at 204 Auburn Avenue, forward them on to New York.[31]

Based on this overwhelming evidence, the trial court below concluded as follows:

> "Respondents John H. (John C.) Calhoun, V. W. (D. W.) Hodges, L. D. Milton and Mrs. Eunice Cooper contend that they are not officers, agents or employees of said corporation, but of the Atlanta Branch, National Association for the Advancement of Colored People, which they contend is not a branch office of said corporation, but an autonomous organization of individuals, and that they have never had in their possession or control any books, records or data of said corporation.
>
> "But the evidence in the case shows to the contrary. The evidence shows, and the Court holds, that said Atlanta Branch is a branch office of said corporation,

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[27] Milton (R. 949).

[28] Id. (R. 956).

[29] Milton (R. 951); Cooper (R. 977); Calhoun (R. 890, 896).

[30] Calhoun (R. 913, 886, 913, 1050).

[31] Hodges (R. 844, 846, 849, 852); Calhoun (R. 879, 881, 886, 905, 913, 1050); Milton (R. 955); Cooper (R. 982).

and that said individuals are corporate agents. Indeed, said corporation registered on June 19, 1956, in the office of the Secretary of State as a foreign corporation, and stated in its registration that its principal office was 20 West 40th Street in the City and State of New York, and that its principal office in Georgia was at 204 Auburn Avenue, Northeast, in the City of Atlanta, which office is that place at which the respondent John H. (John C.) Calhoun, when being confronted with the Court's said order, refused to permit the duly authorized agents of the Revenue Commissioner to inspect the books, records and data which were then and there in said office and in his immediate possession and control" (R. 79-80).

The Evidence Relative to the Acts of Contempt.

The evidence shows that no tax returns had ever been filed by defendant corporation,[32] and that no application for tax exempt status had ever been made in accordance with the Regulation.[33] Agent Strickland testified that he presented the written demand from the Commissioner at the Auburn Avenue office of the corporation and was met at the door by defendant Hodges (R. 742-4), who stated that there were books and records on the premises (R. 746, 752, 761), but that he would have to see defendant Calhoun before the records could be inspected (R. 745); that shortly thereafter defendant Calhoun and Attorney Walden returned, read the demand (R. 747), retired for a conference (R. 748), and then announced that the records would not be made available (R. 754, 755, 762, 777). Strickland further testified:

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[32] Strickland (R. 736); Huber (R. 803). Defendant Calhoun admitted that no returns had been filed (R. 919-20).

[33] Huber (R. 804). When told by the agents that no application for exempt status had been filed, Calhoun did not deny it (R. 928-9).

"Calhoun stated that he would not make the records available at that time" (R. 757-8).

Defendant Calhoun testified that he arrived at the office and read the demand (R. 926), but that the agents were not permitted to see the records (R. 927-931).

Agent Strickland testified that he remained on the premises following refusal of the demand and was present when the sheriff arrived with the Court's order directing production, at which time Calhoun and Walden were present, and service of the order was accepted,[34] but that Calhoun refused to permit inspection of the records (R. 770-73).

Defendant Calhoun admitted that he was served with the court order and that he read it, but that he did not permit the agents to see the books (R. 931). The following colloquy also occurred:

"Q. (By Counsel) And you did not produce them on the 21st?

A. (By Calhoun) I did not" (R. 934).

Calhoun also admitted that at no time subsequent to November 21st were the records made available for inspection, up to the time of trial (R. 934).

It was undisputed that records and books were on the premises at the Auburn Avenue office.[35] Defendant Calhoun testified that records were in filing cabinets at 204 Auburn Avenue (R. 883); that he had custody of the records (R. 887); that a cash receipt book is kept on the premises (R. 888, 903) and a cash box (R. 893).

As to Calhoun's representative capacity and his authority to bind the corporation, he testified that he was

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[34] (R. 768-9) Strickland stated that defendant Calhoun was previously informed that if the demand was not complied with, a court order would be applied for (R. 768).

[35] Strickland (R. 746, 752, 761); Hodges (R. 836, 841).

President of the Atlanta Branch (R. 874) and its highest executive officer (R. 875) and had the responsibility of answering mail (R. 876); that he is "in charge of the office" (R. 881), which, as previously noted, bore the inscription on the door "NAACP, Atlanta Branch" (R. 743); that he "runs the office" (R. 886); that he has custody of the records and lets other people see them (R. 887); that he would accept contributions and fees for the corporation which would be taken to the Branch office (R. 910), and, lastly, that he talked to the New York office on the telephone and told them about being served with the court order (R. 942).

As evidence of the Branch's operations which might subject it to tax liability, it was brought out that the Branch has an office at 204 Auburn Avenue, Atlanta, Georgia,[36] that the records inspected at the Regional office on Hunter Street indicated that the corporation was busily engaged in organizing in the state[37]; that the office at Auburn Avenue comprised two rooms with a desk, telephone and filing cabinets[38]; that the corporation had a state organization[39]; that the Branch receives contributions[40]; that the office employed a secretary and other clerical help[41]; that the Branch maintained a bank account[42]; that the corporation receives dues from its members, part of which is retained by the Branch[43]; and that literature and other propaganda are distributed.[44]

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[36] Strickland (R. 743).

[37] Huber (R. 802, 822).

[38] Hodges (R. 834-5).

[39] Hodges (R. 838).

[40] Hodges (R. 845); Calhoun (R. 881, 885).

[41] Hodges (R. 872); Cooper (R. 983).

[42] Calhoun (R. 885).

[43] Hodges (R. 844-853); Calhoun (R. 886-897; 913).

[44] Hodges (R. 853, 867); Calhoun (R. 898, 907).

Agent Strickland testified that the NAACP's tax status was called to his attention from a list of federally-exempt corporations, which showed that the corporation was not exempt, but only the Legal Defense Fund (R. 788).

Based on this evidence, the trial court below concluded with respect to defendant Calhoun as follows:

> "The evidence shows, and the Court finds, that the respondent John H. (John C.) Calhoun refused to obey the said order when the same was presented to him on November 21, 1956, in that he at said time, as an agent of said corporation, had in his immediate individual possession and control books, records and other data of the Atlanta Branch of said corporation, at the office of said Branch at 204 Auburn Avenue, Northeast, Atlanta, Fulton County, Georgia, which he could have submitted then and there for the inspection of the duly authorized agent of said Revenue Commissioner who was then and there on the premises for the purpose of inspecting the same pursuant to said order of the Court. The evidence shows, and the Court finds, that said respondent John H. (John C.) Calhoun was then and there in wilful contempt of said order and that he has continued in such contempt from time to time and from day to day thereafter, and now is in contempt thereof . . ." (R. 84).

As to defendant corporation the Court found:

> "The evidence shows, and the Court finds, that the National Association for the Advancement of Colored People, a corporation organized under the laws of New York, was guilty of wilful contempt in the respects above stated as to respondent John H. (John C.) Calhoun, and that such contempt has continued from time to time and from day to day thereafter, and that said corporation is now in wilful contempt. It appears that the Revenue Commissioner is undertaking to compile information in respect of any tax liability of said cor-

poration to this State for the calendar years 1947 through 1955, and that all the books, records and other data bearing on the said corporation's income, disbursements and expenses prepared or used by said corporation in the conduct of its business, whether conducted in or without this State during said taxable years, are necessary in order to compile said information . . ." (R. 85).

Procedural Aspects.[45]

The judgment of the trial court adjudging petitioner in contempt was rendered on December 14, 1956 (R. 76-86). Under Georgia law, the bill of exceptions and transcript of record were required to be submitted to the court for certification within 30 days thereafter, Code § 6-902 (Supp.), and while there is no authority or legal manner as of right in which the court can extend this time to enable a party to prepare the record, **Ga Procedure and Practice**, § 23-15, p. 558, the trial judge agreed to permit petitioner to file a "skeleton bill of exceptions" pending completion of the record and preparation of the final bill of exceptions (see order of February 11, 1957). On February 1, 1957, after the record had been typed up and petitioner's bill of exceptions completed, a hearing was held for the purpose of determining the correctness of the bill of exceptions and the record in accordance with Georgia appellate practice.[46]

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[45] The facts concerning certification of the bill of exceptions are set out in various orders of the trial judge which were transmitted to the Court of Appeals as a separate transcript.

[46] Under Georgia law, assignments of error, including narrative statements of the objection made below and the court's ruling thereon, must be set out in a bill of exceptions and certified as true and correct by the trial judge. On the other hand, the brief of evidence sent up, which also requires approval by the trial judge, can contain only "evidence" in the technical sense, and can not include, motions, objections, rulings, and excluded evidence. See Leverett, "The Need for Appellate Reform in Ga.," 18 Ga. B. J. 415 (1956); Ga. Procedure and Practice, § 23-8 et seq.

Following this hearing at which objections to the record were made and discussed, the trial judge rendered an order on February 11, 1957, in which he directed that certain changes and additions be made in the record, in accordance with Code § 6-909 (Supp.).[47] This order directed, inter alia, that a complete unabridged transcript of the proceedings be sent up, but the court was careful to point out that he was not thereby precluding petitioner from also filing a "brief of the evidence" as required by law, viz.:

> "This does not mean that plaintiffs-in-error are precluded from submitting a transcript of the evidence only or a brief of the evidence only to the court for approval. If a correct transcript of the evidence or a correct brief of the evidence is submitted to the Court for approval, the court will approve it and order same filed as a part of the record, if desired; all that the court here is saying is that said entire transcript of the official reporter must go up to the appellate court, and the court is not saying that anything else which is proper to be sent to the appellate court should not also be sent."

This requirement was in keeping with recognized principles of Georgia law to the effect that a trial judge may, in order to enable the appellate court to understand the proceedings below, require the appealing party to set out in the bill of exceptions, or in an exhibit thereto (which in effect was done here) all "relevant matters transpiring before him on the hearing, which may legitimately serve to explain the ruling made or the facts transpiring in connection therewith which will throw light upon it." **Covin**

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[47] Code § 6-909 (Supp.) provides in part: "If the judge shall determine that the bill of exceptions is not true, or does not contain all the necessary facts, he shall return the same, within 10 days, to the party or his attorney, with his objections to the same in writing. If those objections shall be met and removed, the judge may then certify, specifying in his certificate the cause of the delay."

v. Willie, 19 Ga. App. 259, 91 S. E. 278 (1917); **Campbell v. Foute**, 6 Ga. App. 113, 645 S. E. 292 (1909).[48]

The requirement of the trial judge was further predicated on the insistence of petitioner's counsel that certain colloquies be retained in the brief of evidence (improperly, respondent submits) and respondent stated to the court upon the February 1 hearing that if any colloquies were sent up, they all should be, and not just those deemed by petitioner to be favorable to it.

The bill of exceptions and a brief of evidence were retendered by petitioner's counsel on February 18, 1957, but were returned with the court's order of February 26, refusing to certify on the ground that as rewritten, certain corrections should be made therein, and that the unabridged transcript required by the Court's order of February 11, had not been submitted. (See order of Feb. 26.)

Notwithstanding the clear purport of the court's instructions in these two orders, three later successive orders were required before petitioner's counsel finally condescended to comply therewith. (See order of February 26, 1957, and two separate orders rendered on April 13, 1957.) These three orders also dealt with corrections to the transcript and brief of evidence which petitioner's counsel were then in the process of preparing. In its first order of April 13 (for some reason the date was deleted from the copy sent to the Court of Appeals) the trial court directed that petitioner include in the brief of evidence a

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[48] This right of the trial judge to require a transcript of the proceedings, including motions, rulings and colloquies necessary to explain the proceedings before him, should be distinguished from the entirely separate matter of the "brief of evidence" which must contain only evidence (not including motions, rulings, colloquies, etc.) which the *appealing party* must send up himself if he desires to raise questions concerning the evidence. See *Ga. Procedure & Practice*, § 23-12, p. 552; Id., § 22-9.

colloquy between two of its counsel in open court during the trial which was overheard by the trial judge. Mr. E. E. Moore, one of petitioner's counsel, was arguing a motion to dismiss (R. 27) on the ground that the court's order requiring production of the records was void as denying due process for lack of notice prior to issuance. In response to the question from the court, "Well, suppose the court accorded you a hearing now and went into the whole matter and concluded that you ought to produce their records, would you produce them?" Mr. Walden, leading counsel for petitioner, stated to Moore audibly in substance as follows:

> "Tell him we will produce them if he will revoke his order,"

following which Mr. Moore stated to the court that "the defendants now would be put in an embarrassing position if the court did that unless this court . . . would dissolve that original order . . ." (See order of April 13, 1957.)

Subsequently, on June 5, 1957, petitioner filed a pleading noting its compliance with most of the directions of this order, **but unqualifiedly refusing to insert the above colloquy on the ground that the court reporter had failed to record it in his transcribed report of the proceedings.**[49]

In view of this outright refusal of counsel to comply with its order, the court had no alternative but to conditionally certify the bill of exceptions and brief of evidence on June 6, 1957, petitioner's counsel having already prolonged preparation of the record on appeal for approximately six (6) months.

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[49] Under Georgia law, the court reporter's transcript has no official recognition whatever, and the judge's recollection as to the evidence controls. See "The Proposed Rules Revising Appellate Procedure," 19 Ga. B. J. 145, 162 (1956), comment following section 10.

Instead of then making these corrections as pointed out in the Court's certificate to the brief of evidence (R. 1072-3) petitioner elected to contest the action of the trial judge in requiring them by instituting mandamus in the Georgia Court of Appeals.[50]

As filed, the petition for mandamus asserted (1) that the bill of exceptions was conditionally certified by virtue of the conditional approval of the brief of evidence and the reference in the certificate to the bill of exceptions affirming that the brief of evidence had been conditionally certified, and (2) that such conditional certification was illegal in that the trial court was without power to require the corrections noted in the certificate (See Petition for mandamus in the Court of Appeals, Pars. 5, 10).

The Court of Appeals thereafter renderd its decision holding that while the bill of exceptions was conditionally certified, such "conditional certification" was in effect a refusal to certify, and that the trial court was correct in refusing to unconditionally certify until the required corrections had been made. See **NAACP v. Pye, Judge,** 96 Ga. App. 685, 101 S. E. 609 (1957).[51]

Petitioner then applied to the Georgia Supreme Court for certiorari, still vigorously contending that the bill of exceptions had been conditionally certified (See Pet. for certiorari in Georgia Supreme Court). Certiorari was denied without opinion.

Upon remand, petitioner's counsel for some unexplained reason neglected to insert the required corrections in the appropriate pages of the brief so as to present an orderly, understandable record, but filed an entirely separate document purporting to amend the record in the

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[50] See Georgia Code, § 6-910.

[51] No attack is made in the petition for certiorari on this holding of the Court of Appeals.

same sense that a pleading or statute is amended. Moreover, instead of attaching a new, unqualified certificate to the bill of exceptions and obtaining an unconditional certification by the trial judge, petitioner's counsel simply filed the original bill of exceptions which only shortly before petitioner had urged was void as being conditionally certified.

Respondent filed motion to dismiss based, inter alia, on grounds that (1) "The bill of exceptions having been qualifiedly certified, there is no valid writ of error before the court," and (2) "Assuming the certificate to be unconditional, the bill of exceptions was not filed in court within the time required by law" (Tr. 368). This motion was later amended so as to add another ground to the effect that the corrections had not been properly made in the brief of evidence.

The Court of Appeals sustained this motion to dismiss on the grounds that the bill of exceptions had been conditionally certified, and that the purported "amendment" was not the appropriate way to correct a brief of evidence. The court declared:

> "The first part of the judge's certificate that the bill of exceptions was true and specified all the evidence and record material is contradicted by the later statement that the brief of evidence specified was conditionally approved. Such a certificate is not an unqualified certificate that the bill of exceptions specifies all of the record and evidence required. Such a conclusion is implicit, at least, in our ruling on the petition for mandamus. We now expressly so rule. This conclusion is in perfect accord with the contentions of the plaintiffs in error in their petition for mandamus."
>
> "* * * The proper and necessary procedure in the matter would have been for the plaintiffs in error to correct the brief of evidence by including therein the

matter directed by the judge to be included and to delete the matter ordered deleted by the judge and to have the corrected brief approved by the judge unconditionally; and the bill of exceptions should have been corrected as directed by the judge and as corrected should have been presented to the judge whose duty it would have been to sign an unconditional and unqualified certificate to the effect that it specified all of the evidence and record necessary to a clear understanding of the errors complained of. Instead of following the above procedure the plaintiffs in error filed the same bill of exceptions, as aforesaid, which being qualified as stated, under the plain and distinct decisions of the courts of this State amounted to no bill of exceptions at all. A bill of exceptions certified as this one is not certified as required by law and the reference in the purported certificate to insufficiencies of the facts alleged in the bill of exceptions is no more than notice to the party of such defects." **NAACP, Inc., et al. v. Williams**, 98 Ga. App. 74, 104 S. E. 2d 923 (1958).

On motion for rehearing, the Court of Appeals supplemented its opinion by noting that even if petitioner's new contention be true to the effect that the bill of exceptions was unconditionally certified, it would have been filable immediately thereafter—a holding which necessarily determined that in any event the bill of exceptions had not been filed in court within 15 days as required by code § 6-1001 (Supp.)—which failure rendered it void.

The Georgia Supreme Court denied certiorari without opinion, and upon remand, the trial court directed the parties to file statements setting forth the issues remaining to be disposed of.

The response thereto filed by respondent on January 8, 1959, preparatory to entry of a final judgment specified that the following issues remain to be decided:

1.

"The applications of Respondents Ruby Hurley, L. D. Milton, and John H. Calhoun for discharge, and the several answers thereto filed by plaintiff."

2.

"The question as to whether respondent corporation has fully complied with this Court's order and judgment rendered on December 14, 1956."

3.

"* * *

"The question therefore remains for decision as to the assessment, apportionment and reduction, if any, of said fine against respondent corporation."

A similar response was filed by petitioner on January 8, 1959, wherein substantially the same items were set forth.

As the trial judge was constantly engaged in the trial of important cases, no final judgment had been rendered pursuant to these responses up until the time the petition for Certiorari was filed in this court. Whether or not petitioner has ever complied, and to what extent the $25,000.00 fine should be apportioned and/or reduced has not yet been decided.

V.

ARGUMENT.

1. This Court Lacks Jurisdiction for the Reason That the Only Aspect of This Case Which Is Not Moot, i. e., the $25,000 Fine, Is Not Yet Final.

In so far as petitioner alleges (Brief, pp. 28-29) that the order of the trial court in requiring production of all its books and records at the branch office in Atlanta is unreasonable, the question has become moot for the reason that petitioner has in fact complied with this part of the order on May 22-23, 1957.[1] **St. Pierre v. United States,** 319 U. S. 41, 42, 87 L. Ed. 1199 (1943); **Amalgamated Association v. Wisconsin Employment Relations Board,** 340 U. S. 416, 95 L. Ed. 389 (1951); **Eagles v. United States,** 329 U. S. 304, 91 L. Ed. 308 (1946); **Doremus v. Bd. of Education of Hawthorne,** 342 U. S. 429, 96 L. Ed. 475 (1952). In the **St. Pierre** case, it was said:

> "We are of the opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."

With respect to the fine itself, the judgment of the trial court provided that it was subject to being "hereafter assessed and apportioned remedially and punitively, as shall appear just and appropriate to the Court, the Court reserving jurisdiction, after the production of the books,

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[1] Subsequent to rendition of the court's judgment on December 14, 1956 (R. 76), petitioner's counsel informed respondent that New York law prohibited it from removing its records from that state, and by agreement, agents of respondent inspected petitioner's books in New York on May 22-23, 1957, and obtained the desired information.

records and data hereby ordered, to reduce the amount of said fine if such should be just under the circumstances then existing" (R. 86). As pointed out in the Statement, the matter of rendering a final judgment on this fine is now pending before the trial court pursuant to responses filed by both petitioner and respondent in accordance with directions of the Court, and has yet to be heard. Under these circumstances, obviously, this judgment is not final.

Since adoption of the Judiciary Act of 1789 congressional legislation has reflected a marked characteristic of the federal judicial system in not permitting review by this Court of state court decisions until the litigation has been concluded in the state courts. **Montgomery Bldg. & Contr. Trades Council v. Ledbetter Erection Co.**, 344 U. S. 178, 97 L. Ed. 204 (1952); **Radio Station WOW v. Johnson**, 326 U. S. 120, 89 L. Ed. 2092 (1945); **Republic Natural Gas Co. v. Oklahoma**, 334 U. S. 62, 92 L. Ed. 1212 (1948). The requirement of finality is not one of those technicalities to be easily scorned. **Montgomery Bldg. & Contr. Trades Council v. Ledbetter Erection Co.**, supra. It is designed to avoid the evils of piecemeal review. **Pope v. Atlantic Coast Line R. Co.**, 345 U. S. 379, 97 L. Ed. 1094 (1945); **Republic Natural Gas Co. v. Oklahoma**, supra. This requirement derives added force when the jurisdiction of this court is invoked to upset decisions of a state court, because of the possibility of a conflict between the courts of two different governments. **Radio Station WOW v. Johnson**, supra. In addition, the final judgment requirement prevents this court from undertaking to give an opinion upon questions of law divorced from the specific factual setting that a final disposition of the case would disclose. It thus protects this court from indulging in unnecessary and abstract determinations just as much as it protects state tribunals against the exercise by this court of a power of anticipatory review. See Boskey, Finality of State Court Judgments Under the Federal Judicial Code, 43 Columbia L. Rev. 1002 (1943).

For a judgment of a state appellate court to be final and reviewable, it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed. **Gospel Army v. Los Angeles**, 331 U. S. 543, 91 L. Ed. 1663 (1947); **Parker v. Illinois**, 333 U. S. 571, 92 L. Ed. 886 (1948); **Republic Natural Gas Co. v. Oklahoma**, 334 U. S. 68, 92 L. Ed. 1212 (1948); **Georgia R., etc. Co. v. Decatur**, 262 U. S. 432, 67 L. Ed. 1065 (1923); **Mower v. Fletcher**, 114 U. S. 127, 29 L. Ed. 117 (1885). The requirement of finality is not met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up, as for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. **Southern P. Co. v. Gileo**, 351 U. S. 493, 100 L. Ed. 1357 (1956); **Republic Natural Gas Co. v. Oklahoma**, supra; **Mississippi C. R. Co. v. Smith**, 295 U. S. 718, 79 L. Ed. 1673 (1935); and **Martinez v. International Banking Corp.**, 220 U. S. 214, 55 L. Ed. 438 (1911). See also in accord **NAACP v. Alabama**, 357 U. S. 449, 466-467, 2 L. Ed. 2d 1488 (1958).

One pertinent factor for consideration in determining whether a judgment is final is whether or not the "matters left open may generate additional federal questions." **Republic Natural Gas Co. v. Oklahoma**, supra. Obviously, the final action of the trial judge in (1) adjudicating whether there has been compliance, and (2) apportioning and reducing the fine may well produce a complexity of new federal questions which this court will ultimately be called upon to review. Reduction of the fine may even eliminate one of the constitutional questions asserted here.

Petitioner's contention that the fine constitutes "excessive, cruel and unusual" punishment is even more patently non-final. The **only** issue raised by this contention depends upon the **amount** of the fine, and this has yet to be deter-

mined.[2] Petitioner's brief in one place recognizes this, for in footnote 7, it is admitted:

> "However, the contempt adjudication as to this defendant **is still pending for final disposition.**"

Aside from this, however, nowhere in the bill of exceptions is there an assignment of error complaining that the fine was void as being cruel and unusual punishment. So being, the question could not be considered in the Court of Appeals under any circumstances, **Jones v. Andrews,** 89 Ga. App. 734 (2), 81 S. E. 2d 304 (1954), nor in this Court. **Edelman v. California,** 344 U. S. 357, 97 L. Ed. 387 (1953); **Hartford Life Ins. Co. v. Johnson,** 249 U. S. 490, 492, 63 L. Ed. 722 (1919).

2. Adequate State Grounds Support the Decision Below Dismissing the Writ of Error.

Where, as here, the highest state court dismisses an appeal for failure to comply with state procedural requirements, there has been no decision on a federal question which is requisite to this court's jurisdiction under 28 U.S.C.A. 1257. **Newman v. Gates,** 204 U. S. 89, 51 L. Ed. 385 (1907); **Hedgebeth v. North Carolina,** 334 U. S. 806, 92 L. Ed. 1739 (1948). Where an adequate state ground exists upport of the state court's decision below, this Court ... ks jurisdiction even though it may believe that the state court erred in the interpretation of state law. **Leathe v. Thomas,** 207 U. S. 93, 52 L. Ed. 118 (1907); **Enterprise Irrigation District v. Farmers Mutual Canal Co.,** 243 U. S. 157, 61 L. Ed. 644 (1917); **De Saussure v. Gaillard,** 127 U. S. 216, 234, 32 L. Ed. 125, 132 (1888); **Gibson**

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[2] Petitioner itself points out (Brief, p. 30) that the Georgia courts are subject to a limit of $200.00 in imposing a fine for criminal contempt. In so far as the civil aspect of the fine is concerned, counsel for respondent has already agreed with counsel for petitioner upon a civil fine of $423.87 to defray the costs incurred by respondent in connection with the case, so it is obvious that the fine will be subject to considerable reduction.

v. Mississippi, 162 U. S. 565, 591, 40 L. Ed. 1075, 1082 (1896). In such situations, the only question is whether the state court decision is "without any fair or substantial support," **NAACP v. Alabama**, 357 U. S. 449, 2 L. Ed. 2d 1488 (1958), or stated differently, whether it was "rendered in a spirit of evasion, for the purpose of defeating the claim of federal right." **Hartford Life Ins. Co. v. Johnson**, 249 U. S. 490, 492, 63 L. Ed. 722, 724 (1919).

In this case, not only does the decision of the Court of Appeals possess the requisite degree of "fair and substantial support," but it is (1) the correct and only result which the Court of Appeals could have reached, and (2) in complete accordance with the contention of petitioner itself in a prior stage of the case. In addition, there are other adequate state grounds supporting the judgment below which are not attacked by petitioner.

(A) The Decision Below Is Correct and in Accordance With Petitioner's Own Contentions in a Prior Stage of This Case.

The most remarkable feature of this case is the fact that petitioner, after maintaining vigorously and consistently in the mandamus proceedings (including the first petition in the Georgia Supreme Court for certiorari) that the trial judge's "certification" was conditional and qualified, thereby void and of no effect, has now completely reversed its position and just as insistently contends that the Court of Appeals erred in agreeing with its former position, pro tanto.

The petition for mandamus, in Paragraphs 5 and 10, asserted that the certificate was "conditional" and "not qualified." Paragraph 10 declared that the refusal to certify without the modifications therein made,

> ". . . rendered his said certification thereof conditional, thus depriving this Court of jurisdiction to review the judgment rendered in said case."

In the decision of the Court of Appeals denying mandamus, that Court agreed with that part of petitioner's contention (although holding that the trial judge's action was proper under the circumstances), for it was held:

> "A certificate that the facts alleged in a bill of exceptions upon which an appeal is based are not true amounts to a refusal to certify that the bill of exceptions is true. McBurney v. Anderson, 78 Ga. App. 776 (4) (52 S. E. 2d 519). In such circumstances the trial court does not lose jurisdiction to sign a certificate that the bill of exceptions is true, and in a proper case he may be compelled by the appellate court having jurisdiction of the case to so certify." **NAACP et al. v. Pye**, 96 Ga. App. 685.

Similarly, in the petition for certiorari to the Georgia Supreme Court, Paragraph 5 (d), petitioner alleged that the trial judge did,

> ". . . fail and refuse to sign a legal and valid certificate upon the Bill of exceptions in that said certificate, as signed, is not unqualified . . ." (See Record in Case No. 19,980).

In the brief filed by petitioner in the Court of Appeals on the mandamus proceeding (p. 6), it was stated that one of the issues raised therein was as follows:

> "1. Whether or not the certificate of the trial judge to the bill of exceptions is qualified or conditional, and thus, void and invalid."

At page 7, petitioner declared,

> "We respectfully submit that the certificate of the trial judge to the bill of exceptions, is by reason of the above facts qualified and conditional, and therefore invalid. That the necessary effect of the note contained in the certificate to the bill of exceptions abovementioned, is to qualify it; thus, causing the judge to certify that the bill of exceptions is true in part and

untrue in part. See **W. T. Rawleigh Co. v. Forbes**, 202 Ga. 425 . . . **Beasley v. Ga. Power Co.**, 207 Ga. 186, . . .; and **Youmans v. Consumers Financing Corp.**, 80 Ga. App. 676 . . ."

If anything at all stands out clearly in this confused, long, drawn-out litigation, it is the fact that petitioner has heretofore persistently contended, and the Court of Appeals has so adjudicated, that the judge's certificate to the bill of exceptions, dated June 6, 1957, was conditional, qualified, and ineffective to constitute a valid writ of error. So being, respondent is at a complete loss to comprehend or explain the action of petitioner's counsel in shifting gears in mid-stream and now asserting that the certificate was unqualified and valid.

Moreover, even assuming that this was not clear to petitioner's counsel, it is even more difficult to comprehend their failure to properly make the corrections in the record as required by the trial judge and the decision of the Court of Appeals. Instead of withdrawing the brief of evidence and inserting the matters called for by the trial judge at the appropriate pages therein so as to render it intelligible to the reviewing court, and thereafter obtaining a new, unqualified approval of the brief of evidence, petitioner merely sought to file what was purportedly an amendment "amending" the brief of evidence in the same sense that pleadings are amended.

Since as respondent views it, the writ of error was dismissed on these two independent grounds, they will be treated separately herein.

The Certification Was Conditional.

For many years in Georgia, the requirements as to following the precise statutory form for the judge's certificate to a bill of exceptions as set out in Code § 6-806 were enforced in an exceedingly strict manner. Omission

of the words "is true" from the certificate was fatal as these words were accorded the same talismanic properties as "and his heirs" in the ancient English law of conveyancing. See **Weinberg v. Barnes, et al.**, 30 Ga. App. 675, 118 S. E. 758 (1923). Similarly, like efficacy was attributed to "certify." **Owensby v. Thompson**, 69 Ga. 773 (1882). In 1946, the rules of practice and procedure were amended, and a sentence added to Code § 6-806 (prescribing the form of the judge's certificate) as follows:

> " . . . Whenever a judge shall attach his signature to a certificate where the language of the certificate is such as to indicate the intention of the judge to verify the truthfulness of the recitals therein contained, his signature shall be construed as a verification of the bill of exceptions and the contents thereof unless by note thereto or modification thereof over his signature the contrary affirmatively appears."

Applying the rule that statutes are to be construed "keeping in view at all times, the old law, the evil and the remedy," Code § 102-102 (9), it is important that reference be made to the purpose of the 1946 amendment to § 6-806 as published shortly after its passage by one of its authors, Honorable Charles J. Bloch, viz.:

> "Section 6-806 of the Code prescribes the exact form of the certificate of the trial judge to bills of exceptions.
>
> "The Supreme Court, in MacNeill, Treasurer v. Maddox, 194 Ga. 802, considered this section and said: 'It has uniformly been held that when the certificate to the bill of exceptions fails to certify that the same is "true" as required by the Code, Section 6-806, this Court is without jurisdiction to pass upon the merits of the exceptions, and that the writ of error must be dismissed.'
>
> "In that case, the bill of exceptions had been 'approved and certified.' Nevertheless, the writ of error

was dismissed, the Court saying, in the course of the opinion: 'If it should be held that "approved" was the equivalent of certifying that it was true, or that anything less than the words prescribed by the statute would suffice, we would enter upon a field of uncertainty in a matter where the law intended that certainty should prevail.'

"The Court was simply interpreting the statute as it found it. The necessity for a change in the Statute was thus indicated. The change provides that whenever a judge signs a certificate indicating an intention to verify the truth of the recitals in the bill of exceptions, his signature shall be construed as a verification **unless by a note of modification the contrary affirmatively appears.**" See "The Revision of Rules of Practice and Procedure in Georgia," 8 Ga. Bar J. 279, 280 (1946).

It is significant to note exactly what situations the authors had in mind, and which they did not.

The above quote referred to cases where the trial judge merely failed to use the word "true," etc., but used some other word which, although meaning substantially the same thing in common parlance had been held insufficient legally. No attempt was made, nor was it the contention, to change the situation where the defect related not to a **failure** to use the "magic" language, but rather to the **addition** of language contradicting the certification. The purpose of the 1946 amendment was therefore directed toward negative situations rather than affirmative ones. This is apparent on the face of the amendment itself, for after stating in effect that the judge's certificate would be held valid when the language used was sufficient to indicate the judge's intention to certify, there was added the phrase,

" . . . unless by note thereto or modification thereof over his signature the contrary **affirmatively** appears."

This had always been the law prior to 1946. The addition of the phrase last quoted indicates the intention to retain it.

In **Anderson v. Walker & English,** 73 Ga. 114 (1884), the judge's certificate, after certifying the bill of exceptions to be true, added a clause excepting a designated paragraph thereof and setting forth what the judge considered to be the true facts. The Court dismissed the writ of error and declared:

> "Where the certificate of the presiding judge shows that the bill of exceptions as presented is not true, but he certifies that it is true with certain material qualifications stated in the certificate, the writ of error will be dismissed. 67 Ga. 764, 68 id. 27, 71 id. 287.
>
> "(a) When the error in the bill of exceptions was stated in writing by the judge and his objections to signing it were thus made known to the party applying therefor, he should have proceeded to remove the same in the manner prescribed by § 4527 of the Code."

Similarly, in **Masland v. Kemp et al.,** 80 Ga. 365, 10 S. E. 124 (1888), it was held:

> "A bill of exceptions, in order to be properly before this court, must be certified to be true. Where this is not done, but the presiding judge certifies that the bill of exceptions, 'as corrected by notes attached and signed by me, is true,' etc., and after the certificate attaches a paper signed by him, containing several notes materially altering the statements contained in such bill of exceptions, the writ of error will be dismissed."

The case of **Sanges v. State,** 110 Ga. 260, 34 S. E. 327 (1899), declared as follows:

> "When a bill of exceptions containing statements which are not true is presented to a judge, and he, for

the purpose of indicating the inaccuracies therein, makes on the margin thereof divers notes, the recitals of which show that the bill of exceptions is in some respects untrue, and thereupon the counsel tendering the bill declines to make the same conform to the facts, but instead thereof requests the judge to certify it 'as it is,' and he then certifies the bill of exceptions to be true 'as amended,' the writ of error will be dismissed, (1) because by reason of the refusal of counsel to make the needful alterations the bill of exceptions never became a true and correct document entitled to verification; (2) because such marginal notes can not, in view of the facts above recited, be properly regarded as accomplishing this purpose; and (3) because the certificate does not itself contain an unqualified statement that the bill of exceptions is true. Fort v. Sheffield, 108 Ga. 781; Hawkins v. Americus, 102 Ga. 786, and cases cited."

These rules have been uniformly followed. **Priester v. Brady**, 138 Ga. 69, 74 S. E. 757 (1912); **Fort v. Sheffield**, 108 Ga. 781, 33 S. E. 660 (1899); **Eady et al. v. Magnolia Cemetery Co. et al.**, 175 Ga. 787, 166 S. E. 436 (1932); **Central of Ga. Ry. Co. v. Mills**, 143 Ga. 47, 84 S. E. 120 (1915); **Adamson v. Bradley**, 147 Ga. 328, 93 S. E. 894 (1917); **Swafford v. Keaton et al.**, 147 Ga. 491, 94 S. E. 568 (1917); **Watkins v. State**, 29 Ga. App. 320, 114 S. E. 915 (1922); **Jarriel v. Jarriel**, 115 Ga. 23, 41 S. E. 262 (1902); **Love v. Love**, 146 Ga. 160, 91 S. E. 27 (1916); **Hawkins et al. v. Mayor & C. of Americus**, 102 Ga. 786, 30 S. E. 519 (1898).

The facts of the Love case, supra, resemble strikingly those of the instant case, for there it was said:

"Where a bill of exceptions was tendered to the presiding judge three times, and each time he declined to certify it as true, unless certain corrections were made, and when it was tendered to him a fourth time

he signed a certificate in which it was stated that certain parts of the bill of exceptions were 'incorrect,' this did not amount to a certificate that the bill of exceptions 'is true,' and the writ of error must be dismissed."

In the Hawkins case, supra, this Court discussed at length the rules relating to certification, and noted that a distinction exists between cases where the certificate merely failed to use the words "certify as true," and those where the certificate affirmatively declared certain parts thereof to be untrue (102 Ga. 790-1). The reason for the different treatment accorded the latter was then set forth as follows:

> "If judges are authorized at all to certify an imperfect bill as partly true and partly false, the important right given to counsel for plaintiffs in error, of having an opportunity to correct the bill to meet the objections of the judge, must be rendered entirely nugatory. If judges had this power, it is possible that in its legitimate exercise statements or assignments found to be more or less objectionable would be eliminated, and it is possible that where counsel intended to bring to this court for adjudication questions of prime importance, they would find that, for some slight omission or error, only immaterial points were certified as true, while the graver matters in issue might have easily been made to conform to the facts of the case by the observance of the statute."

The Court of Appeals had occasion to pass upon the identical question in issue here in **Youmans, Sheriff, v. Consumers Finance Co.**, 80 Ga. App. 676, 57 S. E. 2d 238 (1950), where it was said:

> " 'If when the bill of exceptions is presented to the trial judge it needs correction or qualification, the

proper amendment should be made in the bill of exceptions itself; and where there is an attempt to limit its verity by a recital in the certificate, the proceeding is nugatory and does not confer jurisdiction upon this court.' Clary v. Nash, 6 Ga. App. 549 (65 S. E. 301). 'Where, as here, the judge's certificate to the bill of exceptions verifies it in part only, and shows it to be in part untrue, the certificate is not a lawful one, and the writ of error must be dismissed.' Jones v. Pierce, 66 Ga. App. 254 (17 S. E. 2d 838), and citations. The amendment to the Code, § 6-806, by the Act of 1946 (Ga. L. 1946, p. 726) did not change this rule where it affirmatively appears, as it does in this case, that the trial judge's certificate amounts to a denial of the truth of some part of the bill of exceptions. W. T. Rawleigh Co. v. Forbes, 202 Ga. 425 (1) (43 S. E. 2d 642)."

This ruling has been consistentiy followed, see **Williams v. Smith, Judge**, 93 Ga. App. 429 (2), 91 S. E. 2d 840 (1956), and **Clyde v. State**, 97 Ga. App. 493, 103 S. E. 2d 448 (1958). The Clyde case was decided by the other division of the Court of Appeals on April 15, 1958, only about two months before the decision in the instant case, which by itself illustrates that petitioner has not been singled out by the court for novel treatment. The Clyde case is very similar to the present one in that in both cases the trial judge set out in his certificate the corrections required.

The case of **Rawleigh Co. v. Forbes**, 202 Ga. 425, 43 S. E. 2d 642 (1947), relied on by petitioner, does not sustain its position, but on the contrary, expressly recognizes that the certificate would be void where "it affirmatively appears to be a denial of the truth of some part thereof." While the certificate there undertook to correct allegations in the bill, the Court held this to be surplusage, and thereby not invalidating the bill, because of the fact that

the corrections referred to had actually been made in the recitations in the bill itself (p. 429). The other matters related to sending up parts of the record.

Moreover, petitioner itself agreed with this interpretation of the Forbes case in the mandamus proceedings, for as previously noted herein, the brief filed by petitioner in the Court of Appeals, at page 7 thereof, declared:

> "We respectfully submit that the certificate of the trial judge to the bill of exceptions, is by reason of the above facts qualified and conditional, and therefore invalid. . . . See **W. T. Rawleigh Co. v. Forbes**, 202 Ga. 425. . . . "

The other cases relied upon by petitioner are distinguished by the decision of the Court of Appeals on rehearing, viz.:

> "The certificate in this case did not attempt to make all corrections necessary in the brief of evidence by inserting them in the certificate or by reference to an approved part of the record, assuming even that such a thing could be done under decisions cited in the opinion, but indicated some deficiencies by mere reference to a conditionally approved brief of the evidence, and the facts of this case do not bring it within the rule that this court can treat as surplusage the additional matter added by the trial judge to his purported certificate. Neither did the certificate require to be sent to this court approved parts of the record which were not specified in the bill of exceptions. These facts render inapplicable the rulings in **Crumley v. Hall**, 202 Ga. 588, 43 S. E. 2d 646; **Harris v. Lumpkin**, 136 Ga. 47, 70 S. E. 869; **Scott v. Whipple**, 116 Ga. 211, 42 S. E. 519."

Next, petitioner points to certain Georgia Code Sections in Title 6, Chapters 13 and 14, which, it is inferred, con-

stitute "liberalized provisions" inconsonant with the holding below (Brief, page 25). However, petitioner has not furnished the court with benefit of any Georgia cases actually applying these sections, and the learned writer of the brief apparently is not fully familiar with the requirements of Georgia law, for in **Ga. Procedure and Practice**, §§ 23-24, it is said with respect to these same statutes upon which petitioner misplaces its reliance:

> "Notwithstanding the broad, liberal phraseology of the Code, Chapter 6-13 relating to dismissals, and Chapter 6-14, relating to amendments, indicative on their face of a most enlightened appellate procedure, the appellate courts, like Hamlet, have apparently ordained that these laws are "more honored in the breach than in the observance."

Of course, whatever the interpretation placed on Georgia statutes by the state courts, whether liberal or illiberal, it is binding on this court, and no one would suggest that the Fourteenth Amendment requires the states to adopt modern procedures patterned after the federal rules. In any event, at no stage of the proceedings below did petitioner request leave to amend the record in accordance with the code sections now belatedly invoked.

Petitioner also relies upon **NAACP v. Alabama**, 357 U. S. 449, 2 L. Ed. 2d 1488 (1958), but that case is readily distinguishable for a number of reasons. In the first place, in dismissing the appeal, the Alabama Court declared that certiorari lay only where the question raised would have rendered the judgment void. Since federal constitutional questions had been raised, it was for this court to say what effect they would have, and implicit in the Court's opinion is the holding that the First Amendment questions were of such a character as to render the judgment void. Secondly, in a prior stage of the case, the Alabama Supreme Court had expressly declared that

certiorari **was the proper remedy** to attack the contempt conviction. Therefore, when on the second appearance the Alabama Court held that certiorari was **not** the appropriate procedure, this court felt constrained to hold this sudden change was simply an effort to deny a federal right under guise of deciding the case on non-federal grounds, viz.:

> "Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of federal constitutional rights" (357 U. S. at 457).

In the instant case, far from misleading petitioner, the first decision of the Court of Appeals clearly pointed out that the bill of exceptions was conditionally certified, and the subsequent decision dismissing the appeal was merely in keeping with this holding. The only thing "novel" here arises not from the court's decision, but from petitioner's sudden about-face in its position as to the judge's certificate to the bill of exceptions.

Lastly, petitioner seeks to infer that it was abused in the trial court below. On the contrary, it was petitioner who sought to trifle with the court. Aside from the fact that the trial judge acquitted all the individual defendants except one, unusual patience and consideration were exhibited toward petitioner's counsel with respect to preparation of the record on appeal. In all, the trial judge rendered a succession of five (5) orders, painstakingly pointing out in specific detail the corrections which were required to be made in the record, notwithstanding which, counsel persistently refused to comply with the court's order. Petitioner has in this court also sought to create the false impression that the trial judge below required it to send up the record in "three separate albeit redundant modes" (Brief, p. 23). In so doing, petitioner treats

as two separate transcripts what is in reality only one, by referring to the "brief of evidence (Br. 110-459) and the amendment thereto" as one transcript, and "The Brief of Evidence (Br. 110-459) and the certificate to the bill of exceptions designating additional portions of the transcript." In so far as petitioner complains of the requirement that the unabridged transcript (in addition to the brief of evidence) be sent up, it neglects to point out that its own insistence that certain colloquies deemed favorable to it be included in the record on appeal constitutes the primary reason that the court below directed that **all** the proceedings be sent up.[1]

(B) **There Are Other Adequate State Grounds Not Attacked by Petitioner.**

1. **Estoppel**—In denying the motion for rehearing, the Court of Appeals declared:

> "Moreover, in order for this court to consider the merits of the plaintiffs' petition for mandamus (96 Ga. App. 685), supra, this court necessarily was required to find, in accordance with their contentions, that the bill of exceptions was conditionally certified, for the reason that if the certificate had been unconditional the trial court was without jurisdiction to sign another certificate, and the case would have been filable in this court on the unconditional certificate already signed. The plaintiffs have now reversed the position which

[1] At the February hearing on the record, respondent advised the trial court that it objected to petitioner including in the record only part of these non-evidentiary matters deemed favorable to it, and that if petitioner wished to send up certain parts thereof, the whole should be included, and not just extracts taken out of context. Under Georgia law, and in the light of petitioner's insistence, the Trial court had no alternative but to direct that the complete transcript be sent up separately, for it was without power to direct that colloquies and other non-evidentiary matters be included in the brief of evidence. See *Ga. Procedure and Practice*, § 23-12, page 552.

> they solemnly took in judicio, and under which they prevailed in obtaining a ruling on the merits of their petition for mandamus, and they are now estopped to contend that the present certificate is unconditional."

"A judgment of the trial court, which after a writ of error stands unreversed, or to which no exception has been taken, is the law of the case." **Palmer v. Jackson,** 188 Ga. 336, 338 (7), 4 S. E. 2nd 28 (1939). This principle applies whether the judgment was right or wrong, **Empire Life Ins. Co. v. Perkins,** 19 Ga. App. 77, 90 S. E. 981 (1916); **Ga.-Ala. Power Co. v. Fields et al.,** 42 Ga. App. 141, 152, 155 S. E. 342 (1930); **Ludden & Bates Sou. Music Co. v. Toney,** 42 Ga. App. 434, 156 S. E. 706 (1931); **Brady v. Joiner,** 101 Ga. 190, 193, 28 S. E. 679 (1897), and while a principle once established may later be reviewed and overruled in another case between different parties, it is nevertheless binding on both the trial and appellate courts in that case on subsequent appearances, although the principle may have already been disapproved in another case. **Walden v. Nichols,** 204 Ga. 532, 534 (2), 50 S. E. 2nd 105 (1948); **Northwestern Mut. Life Ins. Co. v. Suttles,** 201 Ga. 84, 97, 38 S. E. 786 (1946); **Lankford v. Milhollin et al.,** 201 Ga. 594 (4), 40 S. E. 2nd 376 (1946).

As said in **Board of Education of Glynn County v. Day,** 128 Ga. 156, 166, 57 S. E. 359 (1907):

> If, with actual knowledge or notice of the substantial facts, he chooses the position which he will occupy, and which will authorize him to appeal to the courts for one of the remedies, and does in fact proceed in court to enforce such remedy, it would seem to be little short of trifling with judicial procedure to allow him at his mere option to change his mind, dismiss his suit, repudiate the position which he has thus solemnly taken, assume another directly inconsistent with it, and ask the courts to enforce a remedy based on his new

election. If he may change his mind once after having assumed and thus declared his position and based his suit upon it, why may he not do so again? And where is the limitation upon decision and redecision, selection and reselection, and vacillation between inconsistent positions and remedies, as it may appear to the litigant from time to time that his chances are better in one direction or the other? Can he be allowed to swim hither and thither in a sea of legal uncertainty until he has been transfixed by the harpoon of a final judgment?

The decision below having also rested on grounds of estoppel, this is an adequate nonfederal ground and this Court is without jurisdiction. **Enterprise Irrigation Dist. v. Farmers Mutual Canal Company**, 243 U. S. 157, 61 L. Ed. 644 (1917); cf. **Durley v. Mayo**, 351 U. S. 277, 281, 100 L. Ed. 1178 (1956).

2. **Petitioner Failed to Comply With the Mandate of the Court of Appeals in Making Correction to the Record in the Manner Required by Law.**

The decision of the Court of Appeals denying mandamus adjudicated that petitioner should have made the corrections in the brief of evidence pointed out by the judge. This petitioner failed and refused to do in the manner required by law. Instead of withdrawing the brief and actually making the required corrections therein, and attaching a new order of approval by the Court, petitioner merely filed a purported "amendment" to the brief undertaking to amend it in the same way that pleadings and statutes are amended. With respect to this procedure adopted by petitioner, the Court of Appeals held:

> ". . . The proper and necessary procedure in the matter would have been for plaintiffs in error to correct the brief of evidence by including therein the

matter directed by the judge to be included and to delete the matter ordered deleted by the judge and to have the corrected brief approved by the judge unconditionally; and the bill of exceptions should have been corrected as directed by the judge and as corrected should have been presented to the judge whose duty it would have been to sign an unconditional and unqualified certificate to the effect that it specified all of the evidence and record necessary to a clear understanding of the errors complained of" (98 Ga. App. at 79).

If counsel can amend a brief of evidence in this fashion, it would result in this court being confronted with the impossible task of resolving conflicts between the amendment and the brief. The reviewing court would never be able to consider the merits of the case, as it would become hopelessly involved in making corrections in the brief that should have been made by counsel. The same consideration lies behind the rule that a brief of evidence may not be briefed merely by making erasures and interlineations therein, but the brief must be first briefed and then recopied. **Jones v. West View Cemetery,** 103 Ga. 560 (1), 29 S. E. 710 (1897); **Collins Park Co. v. Ware,** 110 Ga. 307, 35 S. E. 121 (1900).

The requirements of Georgia law as to preparation of the record on appeal are for the benefit of the appellate courts, so as to enable them to intelligently understand the questions involved without having to wander hopelessly through the record in search of issues. **Patterson v. Beck,** 133 Ga. 701, 704, 66 S. E. 911 (1910); **Murray v. Davidson,** 174 Ga. 213, 218, 162 S. E. 526 (1932). Such requirements are made necessary by the large volume of cases annually handled by the two Georgia appellate courts, for an inspection of any volume of the South Eastern Reporter will readily disclose that almost as many cases are

decided by the Georiga appellate courts as all the other courts in the southeastern part of the United States combined.

(C) Even Assuming the Bill of Exceptions Was Unconditionally Certified, It Was Subject to Dismissal Because Not Filed Within the Time Prescribed by Law.

The only certificate ever placed on the bill of exceptions was signed on June 6, 1957. It was not filed until March 6, 1958 (R. 61)—9 months later. Georgia law requires that a bill of exceptions be filed in court within 15 days after certification, Ga. Code, § 6-1001 (Supp.). As pointed out by the Court of Appeals below (98 Ga. App. at 80), "if the certificate had been unconditional the trial court was without jurisdiction to sign another certificate,[2] and the case would have been filable in this court on the unconditional certificate already signed." Therefore, viewed in any light, petitioner can not prevail.

3. The Judgment of Contempt Is Not Erroneous for Any Reason Assigned.

The principal attack on the merits made by petitioner on the contempt adjudication below concerns the contention that due process required notice and hearing prior to issuance of the court's order requiring production. This contention fails because of the non-existence of the premise upon which it is based. The motion to dismiss filed by petitioner asserts that the court's order requiring production "was a final adjudication of the rights of the defendant"

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[2] Under Georgia law, once a bill of exceptions is unconditionally certified, the trial court loses jurisdiction to sign a second certificate or take any other proceedings in the case, *Ga. Procedure and Practice*, §23-16, p. 562; but as held in the instant case, a conditional certification is no certification at all, but only notice to the tendering party to make corrections, and the court retains jurisdiction thereafter to certify upon correction of the bill.

(R. 27). Throughout all the trial proceedings below was witnessed the spectacle of petitioner's counsel ardently insisting to the trial court that its order conclusively adjudicated (1) that petitioner had records which it was capable of producing; (2) that the records of the branch were records of the corporation; (3) that the corporation was subject to payment of income taxes, and (4) that there had been a wilful and deliberate refusal. If the 700 pages of evidence on these issues do rest clearly indicate that such was not the case, all the answer that is required may be found from the assurance given petitioner's counsel by the trial court (R. 731-3; 133-190; 79). The procedure employed here has many times been upheld. **Isbrandtsen-Moler Co. v. U. S.**, 300 U. S. 139, 149, 81 L. Ed. 562, 570 (1937); **Consolidated Rendering Company v. Vermont**, 207 U. S. 541, 551, 52 L. Ed. 327 (1908); **Wheeler v. United States**, 226 U. S. 478, 57 L. Ed. 309 (1913); **Goodyear Tire and Rubber Co. et al. v. N. L. R. B.**, 122 Fed. 450 (C. C. 6th 1941). The question is analogous to ex parte restraining orders, which although issued prior to hearing, are uniformly upheld. **Webb v. Hicks**, 117 Ga. 335, 340, 43 S. E. 738 (1903); **Buchnan v. Smith et al.**, 136 N. J. Eq. 246, 41 A. 2d 262, 264 (1945). The procedure employed here does not go as far as the statutes applicable to the Internal Revenue Service, which authorize contempt proceedings upon the basis of a respondent's refusal to honor the administrative subpoena, without the necessity of a court order. See 26 U. S. C. A., Sections 7602, 7604 (b), 7402.

What petitioner really objects to, although not admitted, is having to make the choice of producing or not producing upon pain of contempt, rather than determining these issues beforehand. This contention is now new: "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here—

he may incur the penalty of death." **Nash v. United States**, 229 U. S. 373, 377, 57 L. Ed. 1232 (1913). The same situation is present in every prosecution for contempt of Congress under 2 U. S. C. A., § 182 (Supp.), where, as here, the hearing on the legality of a witness' refusal is determined after the fact. The important thing is that a hearing is had at which ample opportunity is afforded for presenting all defenses before the judgment is made final. **Wilson v. Standefer**, 184 U. S. 399, 415, 46 L. Ed. 612, 619 (1902); cf. **Moore Ice Cream Co. v. Rose**, 289 U. S. 373, 384, 77 L. Ed. 1265 (1933); **Bowles v. Willingham**, 321 U. S. 503, 520, 88 L. Ed. 892 (1944); **Yakus v. U. S.**, 321 U. S. 414, 442, 88 L. Ed. 834 (1944). The reason why hearing is not afforded prior to the time that the demand for inspection must be honored or rejected is obvious. Agent Strickland testified below that: ". . . I mean we cannot send letters out and say will you appear with your books after thirty or forty or fifty days in advance. I mean we would never get them. They may be changed; they may be gone out of the State. It is not practical to operate that way" (R. 766).

Nor is it material whether or not petitioner ultimately be deemed subject to the state income tax laws. The whole purpose of the administrative proceeding was for the agency itself to determine the issue of coverage, **Oklahoma Press Co. v. Walling**, 327 U. S. 186, 216, 90 L. Ed. 614 (1946); **Endicott Johnson Co. v. Perkins**, 317 U. S. 501, 87 L. Ed. 424 (1943), and public officials have "a legitimate right to satisfy themselves that corporate behavior is consistent with the law and public interest." **United States v. Morton Salt Co.**, 338 U. S. 632, 94 L. Ed. 401 (1950).

Moreover, this case is altogether distinguishable from **NAACP v. Alabama**, supra, relied upon by petitioner. Here there was no broad, sweeping inquiry unrelated to any legitimate public interest requiring disclosure. Respondent below was not seeking to obtain petitioner's mem-

bership lists, but only information relevant to taxability. Any such information obtained was confidential and unauthorized disclosure is punishable as a misdemeanor. Ga. Code, Sections 92-3216, 92-9914. Petitioner objects that the inquiry was too broad in that records relating to out-of-state transactions were also being sought, but the Georgia income tax for foreign corporations is computed on a three-factor ratio which necessarily requires information as to a taxpayer's activities outside the state for the purpose of establishing the ratio. See Ga. Code, § 92-3113, recently before this Court in **Williams, Rev. Comm'r, v. Stockham Valves, Inc.**, ... U. S. ..., 3 L. Ed. 2nd 421 (decided Feb. 24, 1959).

Insofar as the petitioner contends that the court order was unreasonable in requiring production of records outside the state, the cases clearly establish a contrary rule. **Consolidated Rendering Co. v. Vermont**, supra; **Hammond Packing Co. v. Arkansas**, supra; **In re Application of Daniels**, 140 F. Supp. 322 (D. C. N. Y. 1956), aff'd 224 F. 2d 882; **Natural Gas Pipeline Co. v. Slattery**, 302 U. S. 300, 82 L. Ed. 276 (1937). However, this question is moot in any event, for respondent's agents have already inspected petitioner's books in New York pursuant to stipulation, and this question is no longer in the case. (See Part 1 of the argument, supra.)

VI.

CONCLUSION.

Having steadfastly maintained in the mandamus proceedings before the Court of Appeals that the writ of error was conditionally certified, and that Court having therein so held, petitioner is hardly in a position now to claim that subsequent dismissal of its appeal is violative of those "fundamental principles of liberty and justice which lie

at the base of all our civil and political institutions." In any event, the judgment below is not jurisdictionally final. The writ should be denied.

Respectfully submitted,

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